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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

6 RONALD COLLINS,

7 Plaintiff,

8 v.

9 JOSHUA COLLINS, et. al.,

10 Defendants.
11

Case No. 3:16-cv-00111-MMD-WGC

ORDER

Re: ECF No. 72

12 Before the court is Plaintiff's Opposition to Defendants' Suggestion of Death of
13 Defendant Julie Rexwinkel and Motion to Substitute Rexwinkel for her Estate, and Objection.
14 (ECF Nos. 71, 72.) Defendants filed a response, titled a "Notice of Compliance." (ECF No. 88.)
15 Plaintiff filed a "response" which he also labeled as an objection to Defendants' Notice of
16 Compliance. (ECF No. 91.) Defendants filed a reply in support of their Notice of Compliance.
17 (ECF Nos. 93, 93-1.)

18 **I. BACKGROUND**

19 Plaintiff's Amended Complaint is proceeding with the following claims: (1) a First
20 Amendment retaliation and Eighth Amendment excessive force claim in Count I against defendant
21 Collins; (2) an Eighth Amendment excessive force claim in Count II against defendant Hightower;
22 (3) an Eighth Amendment deliberate indifference to serious medical needs claim in Count III
23 against defendants Gedney, Marr, and Aranas; (4) a Fourteenth Amendment due process claim
24 against defendants Rexwinkel, LeGrand, McDaniel, Keith, Baca, Deal, Walsh, Irvin, Foster and
25 Skulstad. (ECF Nos. 8, 19, 20.)

26 On June 20, 2018, Defendants filed a suggestion of death as to defendant Julie Rexwinkel.
27 (ECF No. 61.)

28 In his motion, Plaintiff states that Defendants waited months after Rexwinkel's death to

1 notify him, and requests proof of time of death. In addition, he states that Rexwinkel should not
2 be dismissed as a substitute can be made pursuant to Rule 25. He states that under Rule 25, the
3 State can be substituted for her in her official capacity since she was a supervisor, and that her
4 estate can be substituted for her in her individual capacity.

5 The court addressed this motion preliminarily at a hearing on July 16, 2018. (Minutes at
6 ECF No. 78 at 3-4.) The court explained that pursuant to Federal Rule of Civil Procedure 25,
7 Rexwinkel's death did not automatically terminate her as a defendant, and the court directed
8 Deputy Attorney General Zana to undertake efforts to ascertain whether or not there is an estate
9 for Julie Rexwinkel. As such, the court gave Defendants additional time to respond to Plaintiff's
10 motion for substitution, and directed Defendants to include in their response a discussion of
11 whether or not there is an estate for Ms. Rexwinkel.

12 In Defendants' response, Deputy Attorney General Zana asserts that she was informed on
13 June 19, 2018, by another Deputy Attorney General, Erin Albright, that she had received notice
14 from the United States Marshals Service that service could not be accomplished in one of her cases
15 due to the death of Julie Rexwinkel. (ECF No. 88.) Defense counsel reports that she asked Deputy
16 Attorney General Albright about what information she had; made multiple telephone calls to the
17 last known telephone number; sent correspondence via certified and first class mail; reviewed court
18 and probate websites for the last known counties where she resided; but, was unable to locate any
19 record of a probate and/or estate for Julie Rexwinkel. (ECF No. 88.) This information is verified
20 in Ms. Zana's declaration. (ECF No. 93-1.)

21 In his response brief, Plaintiff states that Rexwinkel's husband was a corrections officer at
22 NNCC, and would be a successor representative. (ECF No. 91.) On this basis, Plaintiff "objects"
23 to Defendants' filing in response to the court's order to undertake efforts to determine if there was
24 an estate or substitute.

25 Upon receipt of Plaintiff's response, Deputy Attorney General undertook additional
26 investigatory steps and discovered that a Darrel Rexwinkel retired from NDOC on
27 October 6, 2007, and she verified that the address and telephone number on file for Darrel
28 Rexwinkel and Julie Rexwinkel are the same. (Zana Decl., ECF No. 93-1 ¶¶ 9-10.) Ms. Zana sent

1 correspondence to that address, but did not receive any documentation or contact in response. (*Id.*
2 ¶ 3.) In addition, the voice mailbox connected to the telephone number (the only number left on
3 file for either Rexwinkel) was full, and no voice message could be left, despite multiple efforts.
4 (*Id.* ¶ 5.)

5 **II. DISCUSSION**

6 First, the court accepts Ms. Zana's explanation that she did not learn of Ms. Rexwinkel's
7 death until June 19, 2018, when Ms. Albright advised her that service was not accomplished as to
8 Julie Rexwinkel in another case, with the United States Marshals Service noting Ms. Rexwinkel
9 was deceased. Ms. Zana filed the suggestion of death the following day. Therefore, Plaintiff's
10 "objection" to the suggestion of death is not well taken.

11 The court will now address Plaintiff's motion to substitute.

12 Federal Rule of Civil Procedure 25 provides in pertinent part:

13 **(a) Death**

14 (1) *Substitution if the Claim is Not Extinguished.* If a party dies and the
15 claim is not extinguished, the court may order substitution of the proper party. A
16 motion for substitution may be made by any party or by the decedent's successor
or representative. If the motion is not made within 90 days after service of a
statement noting the death, the action by or against the decedent must be dismissed.

17 ...

18 (3) *Service.* A motion to substitute, together with a notice of hearing, must
19 be served on the parties as provided in Rule 5 and on nonparties as provided in Rule
4. A statement noting death must be served in the same manner. Service may be
made in any judicial district.

20 ...

21 **(d) Public Officers; Death or Separation from Office.** An action does not abate
22 when a public officer who is a party in an official capacity dies, resigns, or
23 otherwise ceases to hold office while the action is pending. The officer's successor
is automatically substituted as a party. Later proceedings should be in the
substituted party's name, but any misnomer not affecting the parties' substantial
rights must be disregarded. The court may order substitution at any time, but the
absence of such an order does not affect the substitution.

24 Fed. R. Civ. P. 25(a)(1), (3), (d).

25 The law of the forum state generally determines whether a section 1983 action survives or
26 is extinguished upon the death of a party. *See* 42 U.S.C. § 1988(a); *see also Robertson v. Wegmann*,
27 436 U.S. 588-59 (1978).

28 Nevada law provides: "Except as otherwise provided in this section, no cause of action is

1 lost by reason of the death of any person, but may be maintained by or against the person's executor
2 or administrator." Nevada Revised Statute (NRS) 41.100(1). "In an action against an executor or
3 administrator, any damages may be awarded which would have been recovered against the
4 decedent if the decedent had lived, except damages awardable under NRS 42.005 or 42.010 or
5 other damages imposed primarily for the sake of example or to punish the defendant." NRS
6 41.100(2).

7 Therefore, the claim asserted against Rexwinkel is not extinguished by her death.

8 Plaintiff's Amended Complaint checked the boxes indicating Rexwinkel is being sued in
9 both her individual and official capacities. The screening order allowed Plaintiff to proceed on the
10 amended complaint with a due process claim against Rexwinkel in Count IV, but did not
11 specifically address the claim in terms of her being sued in her individual versus official capacity.

12 A state official sued in his or her *official* capacity for damages is not a person subject to
13 suit under section 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). State
14 officials sued in their official capacity for *injunctive relief*, however, are persons for purposes of
15 section 1983. *See id.* at 71, n. 10. A claim against a defendant in his or her official capacity is
16 actually a suit against the entity of which the named defendant is an agent. *See Kentucky v.*
17 *Graham*, 473 U.S. 159 (1985). The real party in interest in such suits is the entity itself, and the
18 entity, not the named defendant, will be liable for any damages. *Id.* at 166. In an official-capacity
19 suit, the plaintiff must demonstrate that a policy or custom of the government entity of which the
20 official is an agent was the moving force behind the violation. *See Hafer v. Melo*, 502 U.S. 21, 25
21 (1991).

22 Personal capacity suits, on the other hand, "seek to impose personal liability upon a
23 government official for actions [the official] takes under color of state law." *Kentucky*, 473 U.S.
24 at 165. Liability in a personal-capacity suit can be demonstrated by showing that the official caused
25 the alleged constitutional injury. *See id.* at 166.

26 The only claim proceeding against Rexwinkel is in Count IV. There, Plaintiff alleges he
27 was wrongfully placed into a security threat group (STG) and as a result he has been placed in
28 administrative segregation for over two years. He alleges he requested multiple STG due process

1 classification hearings but Rexwinkel, LeGrand, McDaniel, Keith, Baca, Deal, Walsh, Irvin,
2 Foster, and Skulstad refused to hold one. The court allowed him to proceed with his due process
3 claim based on these allegations. (ECF No. 8 at 15-16; ECF No. 19.)

4 More specifically, Plaintiff alleges that he was sent to NNCC on May 2, 2013 due to his
5 medical condition, and on arrival, he was told by Rexwinkel that he could not be placed in the
6 general population yard or in the general population medical unit because he was classified to an
7 STG group. Plaintiff told her he had never been given a hearing, and asked for one. He was then
8 placed in the administrative segregation unit. He alleges that she denied his request.

9 While Plaintiff checked the box indicating he was suing Rexwinkel in her official capacity,
10 he does not include a request for injunctive relief such that he could maintain an official-capacity
11 suit against her. Even if he did, he does not include allegations that would support an official-
12 capacity claim against Rexwinkel, *i.e.*, that a policy of NDOC was the moving force behind the
13 alleged constitutional violation. Instead, he alleges that the due process violation was the result of
14 actions taken by Rexwinkel individually in denying his request for a hearing on his STG
15 classification. Therefore, Plaintiff does not state an official-capacity claim against Rexwinkel, and
16 there is no need to address his argument that the court should substitute a party pursuant to Rule
17 25(d).

18 The court will now address whether and how the individual capacity claim might proceed
19 against Rexwinkel in light of her death.

20 “If a party dies and the claim is not thereby extinguished,” as is the case here, “the court
21 may order substitution of the proper parties.” Fed. R. Civ. P. 25(a)(1). Any party or the decedent’s
22 successor or representative may make a motion for substitution. *Id.* If not made within ninety days
23 after service of a statement noting the death, the action must be dismissed with respect to the
24 decedent. *Id.* The rule requires that a motion to substitute, as well as the statement noting death,
25 be served on parties pursuant to Rule 5 and on non-parties pursuant to Rule 4. Fed. R. Civ. P.
26 25(a)(3).

27 In *In re MGM Mirage Securities Litigation*, 282 F.R.D. 600 (D. Nev. 2012), District Judge
28 Navarro recognized that neither Rule 25 nor the Ninth Circuit have required a defendant to identify

1 a successor in the suggestion of death, but some district courts within the Ninth Circuit have
2 required a defendant who has filed a suggestion of death to undertake reasonable efforts to
3 discovery the identity of a successor or representative. *In re MGM Mirage Securities Litigation*,
4 282 F.R.D. at 603 (citations omitted). There, Judge Navarro directed the defendants to undertake
5 an investigation regarding the status of the decedent's estate, and if counsel was able to obtain
6 information about the representative of the estate or appropriate successor, the notice of suggestion
7 of death was to be served on the proper non-party. *Id.* If counsel was unable to obtain the
8 information, a declaration was to be filed describing the efforts made to comply with the order. *Id.*

9 Following this rationale, the court directed Deputy Attorney General Zana to undertake
10 efforts to determine whether or not there was an estate and potential successor party for Julie
11 Rexwinkel. The court directed the same undertaking be made in another case where Rexwinkel
12 was named a defendant, but was assigned another Deputy Attorney General, Erin Albright. (*See*
13 Case No. 3:17-cv-00043-MMD-WGC, *Brand v. Cox, et. al.*, ECF No. 68.) While Judge Navarro
14 concluded in *In re MGM Mirage Securities Litigation* that the plaintiff was not relieved of also
15 making reasonable inquiry regarding the appropriate successor, in both this case and *Brand*, the
16 court did not impose, at least initially, a similar obligation on the plaintiffs, who are pro se inmates,
17 that would have little or no resources to discover the pertinent information.

18 Ms. Zana indicates that she discussed the matter with Ms. Albright, left messages and sent
19 correspondence to the last known contact information for Rexwinkel, and checked websites to
20 determine if there was any information available regarding an estate for Ms. Rexwinkel, to no
21 avail. After receiving Plaintiff's response indicating Ms. Rexwinkel was married to a person who
22 had also been employed by NDOC, she verified that was the case, and that the address she had on
23 file for both was the same. She had sent correspondence and attempted to contact the number on
24 file, and received no response.

25 In connection with the *Brand* case, the undersigned also conducted a search of probate
26 records through the State court websites, and searched relevant local newspapers for obituaries,
27 with no success. The court did not locate a motion filed in State court seeking to ascertain or
28 appoint a representative or successor for Ms. Rexwinkel. (*See* ECF No. 3:17-cv-00043-MMD-

1 WGC, ECF No. 76 at 16-17.)

2 At this juncture, the court does not find that any further efforts to identify a successor
3 should be required of Ms. Zana.

4 The Ninth Circuit explicitly declined to address the issue of whether the period to file a
5 motion to substitute when the nonparty successor or representative is not served with the statement
6 noting the death because the appropriate person could not be ascertained at the time the suggestion
7 of death was made. *Barlow v. Ground*, 39 F.3d 231, 234 (9th Cir. 1994) (citations omitted).

8 As in *Brand*, the undersigned adopts the position that the ninety-day period was triggered
9 by the filing of the suggestion of death even though a successor party was not served with the
10 notice because the appropriate person could not be ascertained at the time the suggestion of death
11 was made. See e.g. *Unicorn Tales, Inc. v. Banerjee*, 135 F.3d 467, 469-70 (2d Cir. 1998) (holding
12 that all Rule 25 required was service of the notice of death upon existing parties to trigger the 90-
13 day period in a case where there was inability or significant difficulty identifying the decedent's
14 legal representative or successor); *Williams v. Baron*, No. 2:03-cv-2044 LKK JFM (PC), 2009 WL
15 331371, at *3 (E.D. Cal. 2009) (same).

16 Plaintiff has timely filed a motion to substitute Rexwinkel, but there is no party identified
17 to date to substitute. If no substitute party is identified within ninety-days of the filing of the
18 suggestion of death (filed June 20, 2018), Rexwinkel will be dismissed. Rule 25(a)(1) "does not
19 specify whether the dismissal 'must' be *with prejudice*." *Zanowick v. Baxter Healthcare Corp.*,
20 850 F.3d 1090, 1094 (9th Cir. 2017) (emphasis original). The Ninth Circuit has noted, however,
21 that "the 'history of Rule 25(a) and Rule 6(b) makes it clear that the 90 day time period was not
22 intended to act as a bar to otherwise meritorious actions, and extensions of the period may be
23 liberally granted.'" *Id.* (quoting *Cont'l Bank, N.A. v. Meyer*, 10 F.3d 1293, 1297 (7th Cir. 1993)
24 (citation omitted); *United States v. Miller Bros Constr. Co.*, 505 F.2d 1031, 1035 (10th Cir. 1974);
25 7C Charles Alan Wright, et. al., *Federal Practice and Procedure* § 1955 (3d ed. 2017)). Rule 6(b)
26 would govern a late motion to substitute. *Id.* at 1095.

27 In case Plaintiff should obtain information identifying Rexwinkel's executor or
28 administrator after the ninety-day period expires, Rexwinkel's dismissal upon expiration of the

1 ninety-day time period will be without prejudice. *See id.* (noting that dismissal with prejudice is
2 not mandatory).

3 **III. CONCLUSION**

4 Plaintiff's opposition to the suggestion of death and motion to substitute (ECF No. 72) is
5 **DENIED WITHOUT PREJUDICE**. Plaintiff has ninety-days from the date of the filing of the
6 suggestion of death (filed June 20, 2018) to file a motion to substitute for Rexwinkel (insofar as
7 she is sued in her individual capacity) that identifies a proper substitute, or Rexwinkel will be
8 dismissed from this action without prejudice.

9 **IT IS SO ORDERED.**

10 DATED: August 30, 2018.

11 
12 WILLIAM G. COBB
13 UNITED STATES MAGISTRATE JUDGE
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